

Privy Council Appeal No. 19 of 1963

Henry Augustus Morton Whitby – – – – – *Appellant*
v.
General Medical Council – – – – – *Respondent*

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 29TH JUNE 1964

Present at the Hearing:

LORD EVERSLED

LORD GUEST

LORD UPJOHN

[*Delivered by* LORD EVERSLED]

The appellant before Their Lordships (to whom they will hereafter refer as Mr. Whitby) has invited the Board to exercise its jurisdiction under the Medical Act of 1956 to reverse in his favour the conclusion of the Disciplinary Committee of the General Medical Council, of which he received due notification, that he had been guilty of infamous conduct in a professional respect and accordingly that his name should be erased from the Register of the Medical Council. Their Lordships must confess that the case has caused them considerable anxiety and they think therefore that it will be appropriate first to set out at length the charge dated in the month of April 1963 which the Disciplinary Committee found established and upon which therefore the penalty of erasure was imposed. The charge is in the following terms:

“ That, being registered under the Medical Acts,

(1) From January 1960 onwards you have been Director of the ‘ Cancer Prevention Detection Centre ’, formerly at 12A Prince Edward Mansions, London, W.2, and now in premises at Paddington Green, London, W.2;

(2) You have, while Director of the aforesaid Centre, procured or sanctioned the regular and systematic issue of advertisements, and the employment of canvassers, with a view to:—

(i) directing the attention of the public to the facilities offered by the Centre,

(ii) collecting subscriptions or donations from the general public to the funds of the Centre,

(iii) attracting volunteers for investigation from whom donations or subscriptions might be invited as aforesaid, and

(iv) thereby directly or indirectly promoting your own professional advantage and your own financial benefit;

And that in relation to the facts alleged you have been guilty of infamous conduct in a professional respect.”

There was some argument before their Lordships in regard to the meaning of this charge. As appears from its second paragraph the charge having referred to the issue of advertisements relating to an institution called the Cancer Prevention Detection Centre and having alleged that such advertisements had been procured or sanctioned by Mr. Whitby with a view of directing the attention of the public to the facilities offered by the centre, to collecting subscriptions or donations from the public to the funds of the Centre and to attracting volunteers for investigation, concluded (in subparagraph (iv) in paragraph (2)) with the words “ and thereby directly or indirectly promoting your own professional advantage and your own financial benefit ”. With all respect to the argument of Mr. Hunter, the

substance of the charge and its meaning as set out in the document of April 1963 seem to their Lordships clear enough. The charge was that Mr. Whitby, as the director of the Centre, and the person responsible for its operations, had procured or sanctioned the advertisements mentioned in order to obtain public support for the centre but with a view thereby (that is, by such means) to the direct or indirect promotion of his own professional advantage and financial benefit. There can be no doubt, as Mr. Boydell for the General Medical Council observed, that there are many institutions (of which examples were given) to the advertisements or public appeals of which may be attached the names of well known surgeons. It is however clear in such cases that the sole object of the appeals being the promotion of the institution concerned, the attachment to them of the names of professional medical men is intended to give to the appeals the assurance of the support of qualified members of the medical profession and clear also that any advantage that any such medical man may derive from his being mentioned in such advertisements or appeals is at most unavoidable and fortuitous. In contrast to such cases it is, as their Lordships think, plain from the language of the charge in the present case, that the point made against Mr. Whitby was that by attaching his name and giving his support thereby to the appeals on behalf of this Centre he was to a real and substantial extent concerned and intending to get for himself advanced professional prestige and also financial benefit. In other words the effect and meaning of the charge in the present case was this; that though (as Mr. Boydell conceded) he sincerely believed in the efficacy of the methods of diagnosis which the Centre advocated and utilised for the detection of cancer or of bodily conditions which might turn to cancer, yet he was in truth concerned through the medium of this Centre to build up for himself a high professional reputation and also to get from the money which the public subscribed substantial financial benefit for himself. The Centre was in other words (to adopt Mr. Boydell's language) "Mr. Whitby's alter ego"—it was in effect himself acting through the medium of the Centre and concerned thereby to obtain for himself professional prestige and financial benefit.

The meaning of the phrase by which the charge ends "infamous conduct in a professional respect" has been the subject of considerable judicial pronouncement of high authority. No doubt, as Lord Jenkins observed in the case of *Felix v. General Dental Council* 1960 A.C. 704 at p. 720 the word "infamous" is, according to the ordinary usage of the English language as appears from the definitions given to it in the Oxford English Dictionary, an epithet of the most condemnatory character. Nevertheless (as Lord Jenkins also observed) the phrase "infamous conduct" is for present purposes attached to and forms part of the larger formula including the vital words "in a professional respect". A definition of the phrase was given as long ago as 1894 by the members of the Court of Appeal and particularly by Lopes L. J. in the case of *Allinson v. General Medical Council* 1894 1 Q.B. 750 and more recently in 1930 Scrutton L.J. summarised the effect of the language as meaning "serious misconduct judged by professional standards" (see *R. v. General Medical Council* 1930 1 K.B. 562 at p. 569). It cannot be in doubt that for a long time advertising by a medical practitioner for his own professional benefit has been regarded generally by the profession and according to its standards as infamous conduct of the most marked kind—as indeed it has in like manner been regarded by members of the profession of the Bar. In their Lordships' opinion therefore, if the particulars of the charge in paragraphs (1) and (2), as they have construed it, were made out in fact, there can be no complaint of the conclusion of the disciplinary committee.

It will here be convenient to refer briefly to the judgment of the Board delivered by Viscount Radcliffe in the case of *Fox v. General Medical Council* 1960 3 A.E.R. 225. The noble Lord there pointed out that the duty of the Board now conferred by section 36 of the Medical Act 1956 is of the nature of a rehearing of the charge preferred. But, as the noble Lord went on to observe, the analogy to a re-hearing by a court of appeal whether civil or criminal is not in some respects exact. Particularly there is in such a case as the present no summing-up such as occurs in a criminal case nor is there any statement of

the reasons for the conclusions made by the Disciplinary Committee comparable to the contents of a judgment in a civil action which may come before the Court of Appeal. *Prima facie* therefore the duty of the Board in such a case as the present will be, after an examination of all the evidence, to say whether the conclusion reached by the Disciplinary Committee is one that could properly and reasonably have been reached by a body of professional men. Lord Radcliffe does however further state as follows:—(see page 227 of the report)

“ It is not possible to tell, except by inference, what has been the weight given by the committee to various items or aspects of the evidence, or what considerations of fact or law have proved the determining ones that have led the members to arrive at the decision finally come to. Such considerations, which are unavoidable in appeals of this kind, do sometimes require that the Board should take a comprehensive view of the evidence as a whole and endeavour to form its own conclusion whether a proper inquiry was held and a proper finding made on it, having regard to the rules of evidence under which the committee’s proceedings are regulated.”

Again at the bottom of page 229 Lord Radcliffe stated—

“ It follows that the appeal must fail unless there was some defect in the conduct of the inquiry, by way of admission or rejection of evidence or otherwise, that may fairly be thought to have been of sufficient significance to the result to invalidate the committee’s decision.”

It is the substance of the case now put forward on Mr. Whitby’s behalf before the Board that there were substantial defects in the conduct of the case against him; defects of such significance that the Board should conclude that the hearing before the Disciplinary Committee was so far removed from a fair hearing according to the ordinary standards of justice that the Board should in consequence reverse the Committee’s decision and direct that Mr. Whitby’s name should not be erased from the Register of the Medical Council. If in truth there were defects in the conduct of the enquiry, what then is the duty of the Board? Their Lordships do not attempt any restatement of the general principles applicable to its jurisdiction under the Act: but unless the defects are shown to be of so grave a kind that the Board is satisfied upon a review of all the material before it that the minds of its members were not in the end properly directed to the charge which was being made before them, it is their Lordships’ view that they should respect the conclusion reached by the Disciplinary Committee if upon a review of all the material such conclusion is one that could fairly be reached by a body of professional men; and in so stating their Lordships think that a body of professional men which constitutes the Disciplinary Committee should *prima facie* be regarded as well qualified to form a judgment, whether the conduct of the person charged is or is not in accordance with the ethical standards of the profession.

In the present case their Lordships are unable to avoid the conclusion that in the conduct of the case by the solicitor on behalf of the complainant, the Medical Defence Union, certain matters were referred to which were open to criticism having regard to the nature of the charge which Mr. Whitby was concerned to answer and in one, at any rate, of the instances indicated the matter of fact suggested was in truth unjustified. Their Lordships, as they have said, respect and respect very highly the knowledge and experience of the members of the Disciplinary Committee and their concern to uphold the standards generally understood and expected of the great profession to which they belong. But the “ defects in the conduct of the case ” (to use Lord Radcliffe’s phrase) have caused their Lordships serious concern and the question in the end must be whether as a result of those defects the minds of the Disciplinary Committee were so much diverted from the real charge which they had to try that the Board ought to set aside the Committee’s conclusions.

In the circumstances it will, their Lordships think, first be desirable to give a summary account of the career of Mr. Whitby and then to refer to those matters mentioned both in the opening of the case against Mr. Whitby and also in his cross-examination and at the close of the case upon which

Was there any evidence?
only question

Mr. Hunter has relied as being remote and irrelevant to the charge which Mr. Whitby was facing and upon which he has relied for his proposition that the hearing by the Disciplinary Committee did not conform to the standards of justice and fairness which should be the characteristic of any hearing which can properly be described as judicial.

Mr. Whitby qualified and became a member of the Royal College of Surgeons and Licentiate of the Royal College of Physicians in the year 1924. Thereafter he practised in England being at one time established in Harley Street as a urological surgeon. It is to be noted that in the years 1940 to 1942 he was responsible for the conduct of a nursing home at Datchet where he carried on investigations of the same character as those later conducted by the Cancer Prevention Detection Centre. It was apparently in the year 1936 that Mr. Whitby first became acquainted with the electrical galvanometer apparatus which was the fundamental characteristic of the Centre. Their Lordships have not been informed in regard to the mechanical or technical nature of this apparatus but it was and is (admittedly according to the General Medical Council) the genuine belief of Mr. Whitby that this electrical contrivance does enable diagnosis to be successfully made of cancer or of likelihood of cancer at a very early stage. On the outbreak of war Mr. Whitby appears to have assisted the Armed Forces in his medical capacity until the year 1942 when he was sent to South Africa. At the end of the war he remained in South Africa carrying on a private practice but eventually in the year 1956 he became attached as surgeon to a hospital called the Stanger Hospital in or near Durban being in fact a hospital for coloured people. During his period at this hospital he again, according to the evidence, sought to make use of the electrical galvanometer in order to add to his experience of it in regard to the early discovery of cancer. At the end of 1958 he determined to leave South Africa and return to England, in the first place for a period of six months on unpaid leave and thereafter having resigned his position at the Stanger Hospital he remained in England until the present time. Soon after his return to England he established the Cancer Prevention Detection Centre originally at other addresses but since moved to Paddington Green. In order to enable the Centre to be carried on Mr. Whitby began to issue advertisements in various forms and among other methods of advertisement he obtained police authority to hand out forms in the street to people going in and out of shops. It was a form so handed out that was the subject of the evidence of the first witness called on behalf of the complainant union namely Mrs. Savery, and since the matter is of considerable importance for other purposes their Lordships observe that it was in that circular dated about May 1961 that the statement was made that the Centre had been "recognised by the Charity Commissioners as a charitable trust". In a later part of the circular it is also stated that "as units of a charitable trust the clinics will levy no set fees". As the matter was also referred to at times during the conduct of the case their Lordships further observe that although there was no uniformity in the early stages it eventually became the practice of Mr. Whitby that in circulars or other advertising material not intended for members of the medical profession there was no reference to his own name whereas in reports or other material supplied to members of the profession his name as the person responsible for the conduct of the Centre was mentioned.

During the first year of the Centre's operations its financial resources may be said to have been slender. Thus it appears from an account for the year from the 1st September 1960 to 31st August 1961 that the total of the receipts in the way of donations, subscriptions, gifts and "fees" (and their Lordships draw attention to this word) were some £5,353 13s. 8d. Out of this figure according to the account the largest item of expenditure was that of purchase of equipment but there was also included printing and stationery, motor and travelling expenses, rent, rates, water, electricity and telephone, and biochemical investigations. Nevertheless at the end of the year cited the balance in hand was stated as £2,530 3s. 9d. But this account shows a marked increase both in the amount on the credit side of donations, subscriptions, etc. and also of the balance in hand as compared with the account for the eleven months

ended 31st July 1961. The difference is due to the remarkable circumstance that in or about the month of August 1961 Mr. Whitby was able to prevail upon a gentleman whose name has throughout not been openly stated but who carried on a business in the west of England to support the Centre to the remarkable extent of providing it with no less than £1,000 per week. It is of course obvious that this astonishingly generous donation entirely transformed the financial position of the Centre. Thus the accounts for the succeeding year ending 31st August 1962 show that the amount on the credit side of donations, subscriptions, gifts and "fees" had risen to no less than £24,915 16s. 7d. whereas on the other side the balance in hand was £11,214 16s. 11d. More important, however, it appears from the account last mentioned that during the year to 31st August 1962 there was an item described as "repayment of capital to founder" £7,950. According to Mr. Whitby (and this was a matter referred to in the long letter which he wrote after having the first complaint from the General Medical Council in January 1962) this was said to represent repayment of expenses and losses which he had incurred and which the trustees of the Centre who had been constituted pursuant to a Trust Deed dated 26th January 1960 had agreed at their first meeting to repay to him. The minute of that meeting states that "Trustees agreed that the repayment to the founder of his own capital expended for the advancement of the Centre during the previous five years was an integral part of the object for which the trust fund was raised and specifically authorised the payment of £7,950 by the management committee to the founder during the year to the 31st August 1962". Certain figures were produced to their Lordships (see pages 262 and 331 of the record) which admittedly formed the basis of the payment of £7,950 already referred to. These figures were the subject of considerable comment in the course of the case before the Disciplinary Committee and before the Board and indeed with small wonder; for it cannot be pretended that these figures could properly be described as representing capital expenditure incurred by Mr. Whitby; and in this regard their Lordships have in mind the terms of the relevant clause (3) of the Trust Deed itself which stated the powers which the Trustees had in addition to the conduct of the affairs of the Centre including (in sub-clause ii) power to purchase from Mr. Whitby "such electrical and surgical equipment as he may offer to supply to the Centre". Thus, as appears from the documents mentioned, the first item was described as loss of income while on six months leave from Stanger Hospital £1,150. The other items in the list covered such matters as upkeep of home for himself and his wife; travelling costs; costs of moving to England and of visiting various continental countries; expenses and costs of lease of flat; cost of new car less exchange of old car; and several other items described as "losses". None of the items in the account can properly or fairly be described as capital expenditure as contemplated by the Trust Deed. It was also pointed out that as regards this list of expenses which total no less than £27,387 the last individual item (being loss of income from May 1958) included a duplication of the first item namely loss of income while on leave from the Stanger Hospital South Africa. It is not therefore in doubt that after the generous contributions had been secured in August 1961 from the donor already mentioned Mr. Whitby was put in a position of being able to claim and of recovering considerable sums of money, the total of which in the end amounted to £9,300, the difference between that figure and the figure of £7,950 already mentioned being made up of items paid to him after September 1962 but up to and including the month of February 1963. To this history it may be relevant to add that according to the evidence during the whole period when the Centre was in operation some 650 people attended for examination and there appear at the end of the period to have been engaged some eight professional persons either as doctors or surgeons who gave whole or part-time services conducting the diagnostic work of the Centre.

In the meantime Mr. Whitby had received on the 23rd January 1962 the first letter of complaint from the General Medical Council. It is unnecessary to relate this document at length but it is important to note that the complaint was stated to have been made by a letter of the previous September and in that letter it had been alleged "(1) You have advertised directly or indirectly

for the purpose of obtaining patients or promoting your own professional advantage; (2) You have procured or sanctioned or acquiesced in the publication of notices directing attention to your professional skill and services; and (3) You have canvassed for the purpose of obtaining patients or have sanctioned or been associated with or employed by those who sanctioned the employment of a canvasser". To this communication Mr. Whitby made the long and detailed reply of the 21st March 1962 to which allusion has already been made and which was read to the Disciplinary Committee at the opening of the case against him but to which their Lordships think it unnecessary further to refer save to point out that in the letter Mr. Whitby stressed at great length his belief in the potentialities of his galvanometer and that his activities were directed not to his personal advancement but, since no hospital would give him clinical facilities to make good his belief, to gaining clinical experience in the diagnosis of volunteers and to obtaining funds for that purpose. Their Lordships do however draw attention to the circumstance that in contrast with the charge already quoted the complaint in the letter of January 1962 had upon its face this essential difference namely that there was in it no reference to the Cancer Prevention Detection Centre. The complaint in the letter was one of direct or indirect advertising by Mr. Whitby on his own account for the purpose of obtaining patients or promoting his professional advantage and similar activities. It should be added that, in that letter, it was stated that the complaint was supported by statutory declarations made by three persons, two of whom namely Mrs. Savery and Mr. W. G. St. L. Montague were in fact witnesses before the Disciplinary Committee; and reference was also made to advertisements in the personal columns of the Daily Telegraph and of The Times and of the article appearing in The People of 22nd October 1961. It should be stated that although as already observed no mention was made in the letter of 23rd January 1962 to the Cancer Prevention Detection Centre mention of this institution was made in the advertisements in the Daily Telegraph and The Times mentioned in that letter and also in the article in The People. To the terms of the advertisement in the Daily Telegraph and The Times no great attention need be directed. On the other hand it cannot be in doubt that the article in The People was one which upon the face of it appeared to be very much concerned with Mr. Whitby's own work and claims in managing the Centre and it in fact included a photograph of Mr. Whitby and made at its end the suggestion that a check should be made of Mr. Whitby's claims immediately so that if false they should be dismissed and the unnecessary alarming of people ended but if true so that his technique should be brought into the fight against cancer. Their Lordships must in fairness to Mr. Whitby add that, according to his evidence, he had obtained an assurance from The People that he should be entitled to see the article before its publication—a promise which according to him was never in fact fulfilled.

These being the relevant facts their Lordships return to the charge which they cited at the beginning of this judgment. It is to be observed that the substance and gravamen of the charge was that Mr. Whitby was using this Centre as the medium for obtaining for himself professional advantage by way of enhancement of his reputation as a doctor and also financial benefits. Their Lordships repeat however that it was not in the charge suggested (and any such suggestion was expressly disclaimed by Mr. Boydell before their Lordships) that Mr. Whitby did not genuinely and honestly believe in the efficacy of the diagnosis carried on at the Centre.

In the light of what has been said it is relevant and their Lordships think necessary to make reference next to the opening speech made by the solicitor who appeared before the Disciplinary Committee for the Complainant Union. After reading the charge the solicitor, before opening the case and by the leave of the Committee, proceeded at once to call Mrs. Savery for her convenience. She produced as already mentioned the document received by her as a "hand out" which contained the statement (*inter alia*) that the Trust had been recognised by the Charity Commissioners as a charitable trust. The solicitor then opened his case and proceeded to read the letter of complaint of 23rd January 1962 and having done so made the observation "those are the summarised charges which Mr. Whitby is answering". This is the first

matter which has, as they confess, caused their Lordships concern; for as has already been observed, whereas the charge referred specifically to the Cancer Prevention Detection Centre and alleged that the subject of complaint was that Mr. Whitby had used the Centre as a means, as an 'alter ego', in order to obtain from the public professional prestige and financial advantage, the earlier letter of January 1962 had accused Mr. Whitby of the straightforward and well-recognised offence of advertising directly or indirectly for the purpose of obtaining patients and of canvassing for such purpose. The solicitor then proceeded to read to the committee Mr. Whitby's long reply to the complaint made by the letter of January 1962 and referred also to a number of forms of advertisement and further correspondence passing between Mr. Whitby and the General Medical Council. He made the point which their Lordships think perfectly legitimate that insofar as the advertisements related to the Cancer Prevention Detection Centre their effect was intended inevitably to build up the reputation of Mr. Whitby as the surgical director in charge. The solicitor turned however then to the circular produced by Mrs. Savery and containing the pregnant sentence that there had been recognition by the Charity Commission of the Trust under which the centre was operating and he proceeded to add that "There is not a word of truth in that anywhere. I ask you to remember that if later you have occasion to consider the *bona fides* of Mr. Whitby". To this observation Mr. Boydell thought it right to apply the somewhat euphemistic adjective of "unfortunate". Nevertheless, as later appears, the suggestion that the reference to recognition by the Charity Commission was an entire fabrication was one that was pursued not only during the evidence but at the very conclusion of the case and it is impossible to disregard the obvious inference from such references namely that in falsely suggesting in the relevant circular that the trust established had been recognised by the Charity Commission it could and should be taken that there was no genuine trust whatever for public purposes. Their Lordships refer also to the use of the phrase '*bona fides*' which, as will appear, was used more than once at later stages of the hearing. It is however true that to this phrase more than one meaning may fairly be given. In the first place, and so to speak at one extreme, it may be said that by *bona fides* could be intended the good faith of Mr. Whitby in putting forward the advantages which he alleged would be derived from diagnosis by his electric galvanometer. If this were the inference to be implied from the use of the phrase it was clearly outside the scope of the charge made since, as already noticed, Mr. Boydell has expressly stated that there was no challenge of the honesty of Mr. Whitby in putting forward and in believing in the effective use to be made of this kind of diagnosis. The phrase may, at the other extreme, mean no more than the credibility of Mr. Whitby as a witness; but though this is a possible meaning, it is, as their Lordships venture to think, a somewhat unusual use of the phrase. There remains, however, the third or intermediate use (if their Lordships may use that expression) which was much urged by Mr. Boydell, namely, the good faith of Mr. Whitby in asserting that the canvassing and propagation of his cancer research department was intended or intended primarily and substantially for the public and scientific benefit and was not to be regarded as an alter ego of himself, a cover as it were for obtaining for himself great professional repute and sooner or later considerable financial profit. Whichever be the proper sense to be attributed to the phrase in the context in which it was used in regard to the recognition by the Charity Commission their Lordships do not conceal their view that its use was not properly justified having regard to the facts as they subsequently emerged and that the effect of suggesting to the Disciplinary Committee that a deliberately false statement had been made about the Charity Commission cannot have been other than to suggest to the committee that publication by Mr. Whitby of his advertisements and circulars was not the honest propagation of an enterprise for the public benefit.

The solicitor then referred to the monies obtained by Mr. Whitby in regard to which Mr. Whitby was, as their Lordships have already stated, undoubtedly exposed to serious criticism and made the further point (of itself, perfectly valid as their Lordships think) that a diagnostic radiologist

who advertises in order to induce members of the public to come to his diagnostic centre may not the less be said to be advertising for patients though he does not thereafter "treat" those who are diagnosed as patients in the ordinary sense. The solicitor then proceeded to make it clear that (as originally stated in the Medical Act of 1858) a doctor is not liable to the penalty of having his name erased from the Register by reason of his adoption of some novel or unorthodox medical or surgical theory; but proceeded to submit that the advertisements and other treatises published by or by the authority of Mr. Whitby were such as no registered medical practitioner could publish with an honest belief in their truth—a submission which, as it seems to their Lordships is not altogether easy to reconcile with Mr. Boydell's clear concession that no suggestion was being made as to the honesty of Mr. Whitby in asserting or propagating the efficacy of his electrical diagnosis.

The opening of the case ended with a further reference to the article in *The People* and with the disclaimer (in answer to Mr. Hunter's complaint) of any intention to amend the charge.

There followed the evidence of the two other short witnesses for the Complainant Union. It is only necessary to observe that according to one of them (Mr. Montague) who called at the centre at the suggestion of the Medical Defence Union, Mr. Whitby "talked like a salesman", informed him that the lady who had admitted him had been in fact treated and treated successfully by Mr. Whitby after diagnosis of her condition and indicated that though the fee for the diagnosis was £15 it was not sought to be recovered from those unable to pay it. As regards the last matter it should again in fairness to Mr. Whitby, be stated that there was no other evidence to suggest that such fees were in fact charged or recovered or sought to be charged or recovered from the 650 volunteers who submitted to diagnosis at the centre.

Mr. Whitby then proceeded to give evidence in chief in the course of which he proceeded at appreciable length to describe his method of diagnosis—thereby, as Mr. Boydell observed, inviting inevitably cross-examination upon it. The first point however taken in the cross-examination was the reference in the circular handed to Mrs. Savery to the alleged recognition by the Charity Commissioners and it cannot be doubted that the purpose of the question was the suggestion that the reference was unfounded. Their Lordships having carefully read the whole of the cross-examination do not think it necessary to travel in detail through it. Suffice it to say that among the points put to Mr. Whitby was the fact that he had continued to attach to his name the initials F.I.C.S. notwithstanding that the Collège International de Chirurgiens having in 1947 informed him that he had been elected a Fellow (and sent him a card stating that fact upon its face) had subsequently (to Mr. Whitby's knowledge) informed him that the award had been made in error. "And is that" according to one of the questions asked "your standard of bona fides to represent yourself as what you are not?" There were also questions, as it seems to their Lordships, aimed at showing that Mr. Whitby did not in fact honestly believe in his method of diagnosis or regard the trust which had been created by Deed dated the 26th January 1960 as in truth or reality a charitable trust. Their Lordships quote three questions from pages 129, 130 and 141 respectively of the record:

(1) Q. "If your belief in your method is genuine you must have felt that you were a frustrated benefactor to humanity?"

(2) Q. "I put it to you that those who genuinely believe in medical discoveries are in the habit of communicating them to the profession as soon as they can?"

(3) Q. "Are you seriously telling me that the trustees of a *bona fide* charitable organisation have swallowed this in its entirety and agreed to make you a repayment of it?"

The second question related to the list of items which formed the basis of the payment to Mr. Whitby of the sum of £7,950 in respect of which it cannot be doubted that Mr. Whitby had exposed himself to serious criticism and shortly after the second question above cited and after an objection by Mr. Hunter, the President is recorded as saying "It is also for the Committee to draw inferences from it if they wish to".

The cross-examination of Mr. Whitby was followed by a number of questions put to him by one or other of the members of the Disciplinary Committee, and it is right to observe that none of those questions related to what their Lordships will for convenience call the Charity Commission point. In the circumstances however Mr. Hunter as counsel for Mr. Whitby thought it right to call the managing clerk to the firm of solicitors who had acted for Mr. Whitby at the time of the preparation of the Trust Deed and whose firm had, beyond question, sought the assistance and advice of the Charity Commissioners upon the Deed. The correspondence between the solicitors concerned and the Charity Commissioners was (as Mr. Boydell pointed out) all before the members of the Disciplinary Committee. Their Lordships think it however right to observe that in communicating as they did with the Charity Commissioners the solicitors concerned were following what must (as Their Lordships think) be well established practice; and although it is true that the Charity Commissioners would not on such correspondence be authorised to reach and express a binding conclusion upon whether the trust submitted constituted a charity according to law (and did not in this case do so) yet in such a case as the present they do (as must be well known) their best to assist those who seek their aid. In the present case in their long letter of the 10th November 1959 (which they headed "Proposed charity of Mr. H. A. Morton Whitby") they made a number of suggestions as to the form of the Deed proposed to be executed all of which, as their Lordships understand, were in substance adopted in the final form of the Trust Deed with the single (and somewhat trifling) exception that such Deed contained an obligation by Mr. Whitby to pay over a certain percentage of certain royalties already received instead of (as suggested by the Commissioners) a statement of a figure representing the amount of such royalties; and there is certainly no suggestion on the part of the Commission that the document as presented to them for their comments and advice did not effectively create a charitable trust. Nevertheless when the Managing Clerk in answer to the question why he had submitted the draft deed to the Commissioners rightly said "It is the normal practice" the Legal Assessor observed "that is not an answer" and later during Mr. Hunter's final speech went to the length of saying that the only evidence the Committee had was that the advice given by the Charity Commissioners was not taken. Their Lordships note finally in this regard that the solicitor for the Complainant Union repeated the statement made in his opening that there was "not a word of truth" in the statement appearing in the circular produced by Mrs. Savery that the centre had been recognised as a charitable trust by the Charity Commissioners—a point which he invited the Committee to take into account (like the use by Mr. Whitby of the initials F.I.C.S.) in reaching a conclusion upon Mr. Whitby's "*bona fides*"; though it must also be stated that at the end of his final speech the solicitor did make it quite plain that the Committee was not concerned with the validity of Mr. Whitby's claim for his diagnostic apparatus and concluded with a clear and correct statement of the key-point to be decided.

Their Lordships have thought it right to recite at length from the proceedings before the Disciplinary Committee in justice to Mr. Whitby and to the forceful argument put on his behalf by Mr. Hunter. As stated at the beginning of this judgment their Lordships had indeed felt serious anxiety in regard to the case for they have found it impossible to resist the conclusion that the complaints made by Mr. Hunter were in some real degree justified—that in the words of Lord Radcliffe there were "defects in the conduct" of the case; but in the end of all and upon a review of the whole of the material before them their Lordships have not thought the defects were of such gravity as would entitle the Board in the exercise of its powers under the Act to say that the conclusion of the Disciplinary Committee upon a matter of professional conduct such as that alleged in the charge should be set aside. Their Lordships will say something about each of the matters of which Mr. Hunter complained as extraneous and irrelevant to the charge made against Mr. Whitby. But their Lordships think it desirable first to repeat what they understand the charge plainly to have meant—that is to say, that Mr. Whitby was seeking through the medium of this Centre and the

Trust by which it was governed to build up for himself professional prestige and at some stage, sooner or later, obtain substantial financial benefits out of the money contributed by the public to the Centre. That being its nature their Lordships think that it was clearly open to the Complainant Union in seeking to make good the charge to allege and attempt to prove that Mr. Whitby was not, in promoting the work of the Centre (in the efficacy of which he must be taken to have honestly believed) *bona fide* devoting himself exclusively to the furtherance of that object but had strongly in mind the personal benefits just mentioned; and that the use by the solicitor for the Complainant Union of the phrase '*bona fides*' was intended and should be interpreted in that sense, a sense which, as their Lordships have earlier stated, can fairly be attributed to it and which is the sense in which their Lordships have themselves at the beginning of this sentence used the phrase. On the other hand it is clear that it was not upon the charge as framed, open or proper for the Complainant Union's representative to suggest that Mr. Whitby did not sincerely believe in his diagnostic apparatus. But notwithstanding the form of one of the questions asked of Mr. Whitby in cross-examination which has earlier been cited, their Lordships are satisfied on the whole that it was made clear not only in the opening speech of the solicitor for the Complainant Union but more particularly at the end of his closing speech that no such attack was being made.

A second matter of complaint was that in the early part of his opening speech the solicitor, having read the letter addressed to Mr. Whitby by the General Medical Council in January 1962 stated that the complaint therein made was the same as that which was being preferred before the Disciplinary Committee notwithstanding that the former document alleged direct advertisement for patients without reference to the Cancer Prevention Detection Centre. Their Lordships do not fail to appreciate the point made but observe that the first letter of January 1962 was followed in fact by considerable correspondence between Mr. Whitby and the General Medical Council all of which was before the Disciplinary Committee and that in that correspondence, it had become, as their Lordships think, perfectly plain to Mr. Whitby that the substance of the complaint being made against him was that, notwithstanding the creation of his Centre, still he was, by means of the Centre, seeking his own professional and financial advantage and that was the complaint eventually formulated in the charge. Their Lordships add, moreover, that the charge and therefore its terms were, as they understand, from the beginning of the hearing before each member of the Disciplinary Committee who must be taken therefore to have been aware of its contents.

The next matter of complaint made by Mr. Hunter was the cross-examination of Mr. Whitby directed to show that he had used without proper right and authority the initials F.I.C.S. True it is that if that matter had been of itself the subject of a specific charge then according to rule 8 of the General Medical Council Disciplinary Committee (Procedure) Rules of 1958 it should have been specifically formulated. The point was, however, plainly, as their Lordships read the record, of very secondary importance and its only use—and as such the use was legitimate—was really to impugn the general credibility of Mr. Whitby.

The attack made in reference to the statement in the advertisement produced by Mrs. Savery that the Centre had been recognised by the Charity Commissioners is, as their Lordships are disposed to think, the most serious of the complaints made on Mr. Whitby's behalf. In their Lordships opinion the suggestion (if made good) that Mr. Whitby had quite falsely represented that the Centre had received the imprimatur of the Charity Commissioners as a charity could not be said to be immaterial to the general sense of the charge, namely that he had used the Centre as a means of obtaining at some stage or ultimately enhanced professional prestige and financial benefits; for if it could be shown that the document specifying the Trust applicable to the administration of the Centre made clear that the Centre was not in truth being conducted as a charitable purpose then added force would undoubtedly be given to the gist of the charge made, namely that the Centre was and was intended to be but an alter ego of Mr. Whitby. Had it however been the

intention specifically to charge Mr. Whitby with making false representations to the public about the objects or the management of the Centre there would be indeed much force in the argument that he should under the rules have been given specific notice of such an allegation. Moreover the suggestion made in opening that the statement about recognition by the Charity Commissioners was without any truth whatever was pursued in cross examination and indeed in the final speech of the solicitor for the Complainant Union. Their Lordships therefore certainly endorse the view expressed by Mr. Boydell that these suggestions were "unfortunate". Upon the application of the ordinary principles of justice their Lordships have therefore been seriously concerned in regard to this matter and they also have in mind the observation of the learned Assessor upon this matter made in the course of Mr. Hunter's final speech to which allusion has already been made. But by the end of the case all the material including the evidence of the managing clerk to the solicitors then acting for Mr. Whitby and the correspondence between these solicitors and the Charity Commissioners had been put before the Committee, and in his concluding address Mr. Hunter had forcibly pointed out to the Committee that the allegation was wholly misconceived. Their Lordships cannot think that the Disciplinary Committee were in regard to this matter so misled as to have based their conclusion upon this suggestion and in this regard they do not forget that no question appears to have been asked by any member of the Disciplinary Committee upon this matter of Mr. Whitby. Their Lordships do also add that though without doubt the Charity Commissioners had accepted the Trust put before them as being one intended for charitable purposes the use of the word "recognised" might be open to some comment on the ground that it implied that recognition by the Charity Commissioners had the effect that the Trust could be treated as one to which the qualification of a charity at law had been given in the same way as under recent legislation registration with the Charity Commissioners of a charitable trust provides that qualification.

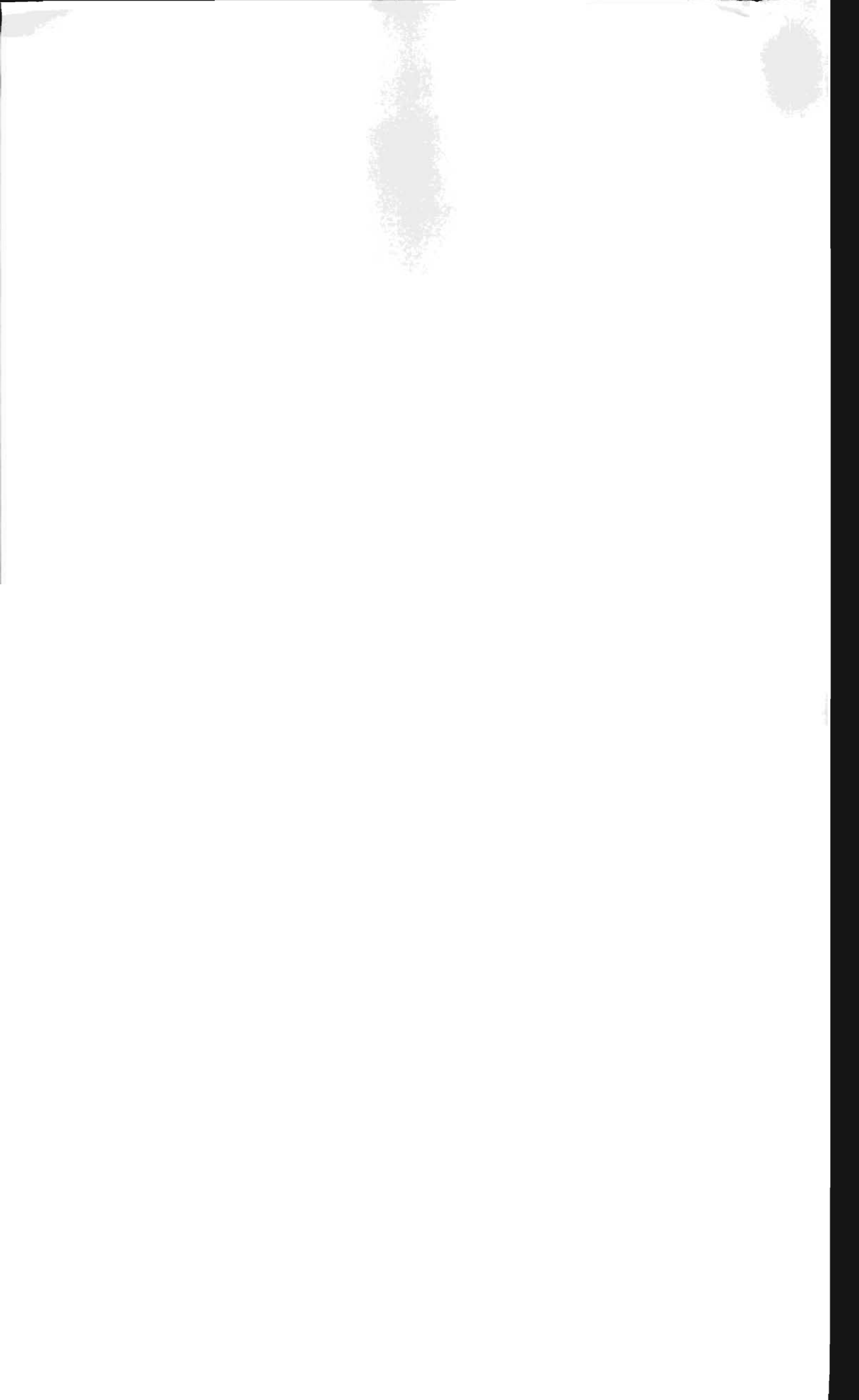
There remains finally the point made in regard to the payment to Mr. Whitby of the sum of £7,930 by the trustees pursuant to the resolution at the meeting of the Trustees on 13th September 1962. It was urged by Mr. Hunter that if the suggestion made against his client was that the payment was not in truth a return of capital then what really had occurred had been a breach of trust and the proper remedy would have been (on some one's part) so to claim against the Trustees. True it is that what was done may, having regard to the nature of the items which made up Mr. Whitby's claim, have been a breach of trust. But the point for present purposes was that if the inference might fairly be drawn that the operation of the Centre was in truth a means by which Mr. Whitby was seeking to obtain for himself not only professional prestige but also financial benefit it is to be noted that the resolution to make this payment was in terms that there should be repayment to Mr. Whitby as the founder of his capital expended for the advancement of the Centre such being an integral part of the objects for which the trust fund was raised. It is also to be noted that this resolution was passed at the first meeting of the trustees which was held more than two years after the formation of the Trust and that at the date of the resolution both the original trustees had in fact resigned, that Mr. Whitby was himself present and that the generous benefactor already mentioned had been appointed, and was also present, as one of the trustees. Without repeating what has already been said it appears clear to their Lordships on examining the various items which made up the total in respect of which the total sum of £9,300 was paid that none of it could properly be called capital expenditure and that in fact what was achieved by Mr. Whitby as the result of this payment was that he had from the Centre and from the public subscriptions to it got back what were in truth his living expenses—that is to say had out of the Trust and out of its funds made to that extent a living for himself.

Their Lordships refer also again to the article in *The People*. Assuming as their Lordships do, that Mr. Whitby's evidence was true that the paper had gone back upon the promise to him to submit the article for his approval before publication nonetheless the information in the article must clearly have been obtained from Mr. Whitby and the general sense of

what is set out in the article may fairly be taken to show that Mr. Whitby was putting forward the claims of and achievements of an institution which was not so much a public scientific enterprise as his own diagnostic clinic. The suggestion at the end of the article that Mr. Whitby's diagnostic methods should be made the subject of competent enquiry may also be said to be relevant to the fact that Mr. Whitby had after all got no professional support (however much he personally believed in the efficacy of his methods) and had indeed (as their Lordships think it may fairly be said), not been at great pains at any rate in the early stages of his Centre to satisfy any scientific or professional body of the validity of what he said and thought to be the efficacy of his apparatus. Mr. Whitby throughout sought financial assistance for the Centre but it may fairly be said that in doing so it is apparent that his intention was that the Centre should be his Centre in the sense that he would himself always be responsible for its direction and management.

In the end therefore as their Lordships have earlier stated they have reached the conclusion upon all the material which was before the Disciplinary Committee that there was upon a review of all that material and notwithstanding the defects in the conduct of the case to which reference has been made sufficient justification for the conclusion of the Disciplinary Committee as a body of professional men. It is not after all to be forgotten that the Disciplinary Committee had the immense advantage of themselves seeing and hearing Mr. Whitby and the other witnesses called. Their Lordships therefore conclude that the defects in the conduct of the case were not in all the circumstances of so grave and substantial a kind as would justify their Lordships in concluding that there was in this case a denial of a fair trial and that the Disciplinary Committee's conclusions should be wholly set aside.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed and they see no ground on which they can do other than order the appellant to pay the costs of the respondent.



In the Privy Council

HENRY AUGUSTUS MORTON WHITBY

v.

GENERAL MEDICAL COUNCIL

DELIVERED BY
LORD EVERSHED